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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH THOMAS,

Defendant and Appellant.

D074921

(Super. Ct. No. SCD221955)

APPEAL from an order of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed.

Keith P. Thomas, in pro. per.; Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Keith P. Thomas appeals from an October 2018 order denying his second petition to recall his third strike sentence under Proposition 36 (Pen. Code,¹ § 1170.126). Thomas's counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436

¹ All further statutory references are to the Penal Code unless otherwise specified.

(*Wende*), indicating she has been unable to identify an arguable issue for reversal on appeal. Counsel asks this court to review the record for error as mandated by *Wende*. We offered Thomas the opportunity to file his own brief on appeal and he has responded with a supplemental brief. We will discuss his brief later in this opinion.

PROCEDURAL BACKGROUND²

In 2010, Thomas was convicted of battery by gassing (§ 243.9, subd. (a)), with findings Thomas had suffered seven strike prior convictions (§ 667, subds. (b)-(i)) and three prison priors (§ 667.5, subd. (b)). Thomas was sentenced to an indeterminate term of 25 years-to-life plus three years for the prison priors.

In 2014, Thomas filed a petition under Proposition 36 to recall his sentence. The court denied the petition in 2016. Thomas appealed the denial of his petition and this court affirmed the denial in an unpublished opinion filed July 2017. (*People v. Thomas* (July 24, 2017, D070653) [nonpub. opn.])

In September 2018, Thomas filed another petition under Proposition 36 to recall his sentence. In his new petition Thomas alleged:

- (1) "[T]he defendant has no third strike that make[s] the defendant eligible for a recall of sentence under Proposition 36.
- (2) "The defendant has been disciplinary free from 2014 to 2018;
- (3) "The defendant request[s] Jennifer Kaplan, Deputy District Attorney at 330 W. Broadway, San Diego, CA 92101 to be assign[ed] to this case of Proposition 36.

² The facts of the 2009 offense for which Thomas was convicted are not relevant to our evaluation of the current record.

(4) "The defendant request[s] that this court schedule a[] hearing [on] Sept 20, 2018[,] for a conference with the Deputy District Attorney Jennifer Kaplan so that the defendant can obtain document[s], record[s] and DVD video and other document[s] from the [D]eputy District [A]ttorney Jennifer Kaplan and other document[s] from the [D]epartment of [C]orrection[s] and Rehabilitation for the prepar[ation] [of] the defendant['s] case in the proceeding of the Proposition 36."

Thomas also separately wrote to the clerk seeking information about filing a petition seeking different relief under Proposition 57.

The trial court denied Thomas's Proposition 36 renewed petition with the following order:

"Petitioner is currently serving a 25 years to life sentence pursuant to the Three Strikes Law. On February 1, 2010, a jury found petitioner guilty of battery committed by gassing in violation of Penal Code section 243.9(a) and found true several prior convictions, including carrying a concealed weapon (former Pen. Code, § 12025(b)); burglary (Pen. Code, § 459); bringing weapons into a state prison or jail (Pen. Code, § 4574); attempted sale, manufacture, or ownership of illegal weapons (Pen. Code, § 664/ [former § 12020]); and seven convictions for criminal threats (Pen. Code, § 422). This court found true three prison priors.

"In February 2014, petitioner filed a petition to recall his sentence under the Three Strikes Law and for resentencing under Proposition 36 (Pen. Code, § 1170.126). The prosecution opposed the petition. The petition was fully adjudicated and a hearing was held on the merits of the petition. On July 1, 2016, this court denied the petition, finding resentencing would be an unreasonable risk of danger to public safety under Proposition 36.

"Petitioner appealed this court's denial of his Proposition 36 petition. On July 24, 2017, the appellate court affirmed this court's denial of the petition. (*People v. Thomas* (July 24, 2017, D070653 [nonpub. opn.].)

"This court has received various letters from petitioner in August 2018 requesting that the court set a hearing pursuant to Proposition

36. On September 7, 2018, this court received a 'Petition for Recall of Sentence under Proposition 36' drafted by petitioner ('Petition'). The Petition is one page and states that petitioner 'has no third strike that make [sic] the defendant eligible for a recall of sentence under Proposition 36.' It also asserts that 'defendant has been disciplinary free from 2014 to 2018.' Petitioner requests that this court schedule a hearing on the Petition and that counsel be assigned.

"The Petition is denied.

"As stated above, petitioner's claim under Proposition 36 has been fully adjudicated. Petitioner has not shown that he is permitted to file successive petitions under Proposition 36 after his claim has been fully adjudicated and decided on the merits. (*In re Clark* (1993) 5 Cal.4th 750, 767-768.) Petitioner does not present any new evidence or changes in law possibly warranting reconsideration of this court's previous ruling. Additionally, the Petition fails to comply with Penal Code section 1170.126(d), which is required.

"Based on the foregoing, the Petition is denied.

"It is further ordered a copy of this order shall be served on (1) petitioner and (2) the San Diego District Attorney, Appellate Division.

"IT IS SO ORDERED."

DISCUSSION

We next address the supplemental brief filed by Thomas. In his brief, Thomas argues he has been discipline free for the past five years and thus he no longer presents a danger as that term is defined in Proposition 36. He also argues he was entitled to file a successive petition under the circumstances of this case. The brief extensively discusses matters outside the record on appeal, particularly his explanations for being placed in the segregate housing unit (SHU) at various times.

Tuning next to the *Wende* brief filed by counsel we have reviewed the entire record as mandated by *Wende* and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). In order to assist our court in its review of the record, and in compliance with *Anders*, counsel has identified the following possible issues for our review: 1) Whether Thomas was permitted to file successive petitions under Proposition 36 after his claim had been fully adjudicated and decided on the merits; and 2) whether the court abused its discretion by denying the petition without allowing Thomas the opportunity to supplement his petition with evidence of changed circumstances, including, but not limited to documents showing he remained discipline free from 2014 to the present

Our review of the record as required by *Wende* and *Anders* has not identified any arguable issue for reversal on appeal. Competent counsel has represented Thomas on this appeal.

DISPOSITION

The order denying appellant's petition filed under section 1170.126 is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.